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No. 834

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAM ACHILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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The petition for certiorari states two questions: (1) whether a person indicted and convicted under Section 145 (b)[1] of the Internal Revenue Code of 1939 must be sentenced under Section 3616 (a)[2] of

[1] "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter [dealing with the income tax] or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[2] "Whenever any person * * * [d]elivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

the Code, where the facts show a violation of both sections; (2) whether there is such an overlap between Sections 145 (b) and 3616 (a) as to preclude imposition of any valid sentence whatsoever.

The assumption on which these questions are framed is that Section 3616 (a) applies to *income* tax returns. However, the validity of that assumption lies at the threshold of the case. If the assumption is invalid, there would be no overlap in the scope of the two provisions, and the Court would not reach the questions raised by the petition for certiorari.

That Section 3616 (a) applies to all returns, including income tax returns, has been the view of the Government, frequently stated both in this Court and in the lower courts, in recent years.[3] This interpretation was accepted mainly because the language of that section is general and unqualified, and in terms appears to embrace every type of federal tax return without exception. In addition, the Government was influenced by the fact that Section 3616 (a) had been invoked, beginning in 1952, in the prosecution of numerous income tax cases,[4] and prior to the Eighth Circuit's decision in *Dillon* v. *United States*, 218 F.

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[3] However, in its brief on the merits in *United States* v. *Noveck*, 273 U. S. 202 (No. 395, Oct. Term 1926), pp. 16-19, the Government contended that the immediate precursor of Section 3616 (a) (Section 3179 of the Revised Statutes of 1874) was "undoubtedly repealed * * * *pro tanto*" as to the income tax by the various specific penalty provisions contained in the successive income tax statutes beginning with the Revenue Act of 1909.

[4] Section 3616 (a) was used in income tax cases where the Government was reluctant to bring felony charges because the offense was deemed to be of minor proportions, e. g., where a taxpayer evaded a very small portion of his income tax by claiming a false dependent in his return. Even if it should

2d 97, decided January 5, 1955, there had been no judicial holdings or intimations that the section could not be so applied. The correctness of this interpretation of Section 3616 (a) was also assumed by the Court in *Berra* v. *United States*, 351 U. S. 131, 133. In that case the Eighth Circuit, following its earlier decision in the *Dillon* case, had affirmed a conviction and sentence under Section 145 (b), on the ground that Section 3616 (a) did not apply to income tax returns. Since both parties agreed that Section 3616 (a) *was* applicable to income tax returns, the Court's opinion in the *Berra* case assumed, *arguendo*, the correctness of that interpretation of the statute. (351 U. S. at 133.) The dissenting opinion of Mr. Justice Black, in which Mr. Justice Douglas joined, similarly considered the case on the basis of the same assumption. (351 U. S. at 138.)

The purpose of this memorandum is to lay before the Court materials bearing on the question whether Section 3616 (a) was in fact intended by Congress to apply to income tax returns. These materials, relating principally to the genesis and history of Section 3616 (a), and its relationship to Section 145 (b) and other specific penal provisions contained in the Internal Revenue Code of 1939, were not brought to the attention of the Court in the *Berra* case because no issue was there tendered as to the proper construction of Section 3616 (a). However, as already noted, the

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be held that the offenses in these cases were laid under the wrong statute (Section 3616 (a)), they were of course cognizable under Section 145 (b). Cf. *Williams* v. *United States*, 168 U. S. 382, 389; Rule 7 (c), Federal R[illegible] of Criminal Procedure.

petition for certiorari in this case squarely presents the question whether Sections 145 (b) and 3616 (a) overlap as to income tax evasions by filing false returns, and the whole basis of petitioner's argument disappears if Section 3616 (a) does not apply to income tax returns. Hence, we consider it essential to the Court's consideration and decision of the case to present a comprehensive review of the relevant legislative materials bearing on the scope and effect of Section 3616 (a), particularly in relation to Section 145 (b).

These materials indicate that the latter section was intended by Congress to be the specific and comprehensive provision dealing with attempted income tax evasion "in any manner," including the filing of a false or fraudulent return; and that to the extent that there may be any inconsistency in the application of the two sections to income tax evasions, such inconsistency must be resolved by the dominant Congressional intent, expressed in eight successive statutes, that income tax evasions are to be treated as felonies, not misdemeanors. In short, in a case like this, involving a conviction of income tax evasion under Section 145 (b), the validity of the sentence is to be determined by reference to that statute alone, not to Section 3616 (a). It is clear, we believe, that Congress intended that every attempt to evade income taxes, whatever the form such attempt might take, should be punishable as a felony under Section 145 (b).

Section 145 (b) in express terms makes it a felony for any person to attempt willful evasion of his in-

come tax liability. It was the statute cited by the grand jury in petitioner's indictment (R. 3–5) and by the trial judge in the judgment of conviction (R. 1212). If regard be had solely to Section 145 (b), there could be no doubt that petitioner's conviction and sentence were lawful in all respects. His sole reliance is upon a statute not cited in the indictment or in the judgment of conviction—Section 3616 (a)—which, he contends, should be construed as precluding the imposition of more than misdemeanor penalties in any case of violation of Section 145 (b) where the facts also show the filing of a false return in violation of Section 3616 (a).

Section 3616 (a) is derived from a penal provision originally enacted in 1798, when there was no federal income tax and when the principal sources of revenue for the Federal Government were excise taxes and customs duties. In that year Congress enacted a statute making it a misdemeanor for "any person * * * [to] deliver or disclose * * * any false or fraudulent list, with intent to defeat or evade the valuation or enumeration hereby directed to be made."[5] Similar provisions appeared in various later revenue acts, including the first act (1861) imposing an income tax.[6] The scope of the prohibition was enlarged in the 1862 act to include a "list or statement"[7] and in the 1864 act to include a "list, re-

[5] Sec. 11, c. 70, 1 Stat. 580, 586.

[6] Secs. 16, 49–51, c. 45, 12 Stat. 292, 298, 309.

[7] Act of July 1, 1862, as amended, Sec. 9, c. 119, 12 Stat. 432, 435.

turn, account or statement."[8] Since the income tax provisions of those acts contained no separate criminal penalty, it would appear that this general criminal provision was intended to apply. However, so far as we can discover, there were no prosecutions under that provision for income tax violations. But cf. *United States* v. *Penz*, 24 Fed. Cas. No. 14,576 (N. D. Ill. 1868).

In 1870 Congress repealed the income tax, effective as of the end of 1871, and added a provision punishing false oaths, then required in connection with other revenue returns, under the penalties of perjury.[9] In 1874, the criminal sanction provided in the 1864 act, with minor changes in phraseology, became Section 3179 of the Revised Statutes.[10] Since there was no income tax law in effect in 1874, Section 3179 could not at that time apply to the income tax. When the next income tax was enacted, however, in 1894, it contained no criminal sanctions but only the same

[8] Act of June 30, 1864, as amended, Secs. 15, 116–123, c. 173, 13 Stat. 223, 227, 281. This Act added the word "assessment" to valuation and "enumeration."

[9] Secs. 6, 11, 37, c. 255, 16 Stat. 256, 257, 259, 271.

[10] Section 3179 read as follows:

"Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglects to appear or to produce said books, he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

civil penalties that had been imposed by the 1870 act—50 per cent of the tax for a willful failure to file and 100 per cent for the wiliful filing of a false or fraudulent return.[11] In omitting any mention of criminal sanctions in the 1894 act, Congress presumably intended that the comprehensive language of Section 3179 of the Revised Statutes should apply. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257, and cases cited; *Barr* v. *United States*, 324 U. S. 83, 90.

In 1909, however, Congress for the first time enacted a specific penal provision applicable to the income tax. The 1909 corporation income tax law specifically imposed maximum criminal penalties of one year in prison and a $1,000 fine for willfully making a false or fraudulent return with intent to defeat or evade the assessment,[12] the same penalties contained in Section 3179. The necessary result was, therefore, that in relation to the income tax the general provision of Section 3179 was superseded *pro tanto* by the specific penal provision in the 1909 act. *United States* v. *Chase*, 135 U. S. 255, 260; *Kepner* v. *United States*, 195 U. S. 100, 125; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. As the subsequent history detailed below will show, the 1909 act established the pattern for the later income tax penal provisions: Congress no longer relied on the general provision of Section 3179 but legislated specifically in the successive income tax laws as to the penalties for violations thereof.

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[11] Compare Sec. 29, c. 349, 28 Stat. 509, 554, with Sec. 11, c. 255, 16 Stat. 256, 259.

[12] Sec. 38 (8), c. 6, 36 Stat. 11, 117.

Four years later, Section II of the Revenue Act of 1913, levying an income tax, imposed maximum criminal penalties of one year in prison and a fine of $2,000 for that same offense.[13] This involved a patent inconsistency with Section 3179, which limited the fine to $1,000, and to that extent implicitly qualified the latter provision.[14] *United States* v. *Tynen*, 11 Wall. 88, 92-93; *United States* v. *Yuginovich*, 256 U. S. 450, 463; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Barnes*, 222 U. S. 513, 520.

The Revenue Act of 1917, which provided for an income tax, after the usual prohibition against false or fraudulent returns, added the new misdemeanor of "evad[ing] or attempt[ing] to evade any tax" imposed by the act.[15] The Revenue Act of 1918 enlarged this offense to proscribe an attempt to evade the tax "in any manner," and raised the maximum fine to $10,000, at the same time retaining the one-year maximum prison sentence.[16] This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns.[17] The Revenue

[13] Sec. II (F), c. 16, 38 Stat. 114, 171.

[14] The Revenue Act of 1916 (Sec. 18, c. 463, 39 Stat. 756, 775) provided the same penalties as that of 1913.

[15] Sec. 1004, c. 63, 40 Stat. 300, 325.

[16] Sec. 253, c. 18, 40 Stat. 1057, 1085.

[17] Revenue Act of 1921, Secs. 253, 1302 (b), c. 136, 42 Stat. 227, 268, 309. Revenue Act of 1924, Sec. 1017 (b), c. 27, 43 Stat. 253, 344. Revenue Act of 1926, Sec. 1114 (b), c. 234, 44 Stat. 9, 116. Revenue Act of 1928, Sec. 146 (b), c. 852, 45 Stat. 791,

Act of 1924 made attempted evasion of income tax a *felony*, punishable by a maximum fine of $10,000 and a five-year maximum prison term.[18] The more severe penalties imposed by the 1924 Act were re-enacted in all subsequent legislation on the subject through 1938[19] and were incorporated into the Internal Revenue Code of 1939 as Section 145 (b).

Section 3616 (a) of the Internal Revenue Code of 1939 re-enacted Section 3179 of the Revised Statues, making only minor changes in phraseology. The committee reports stated that the 1939 Code was intended to be merely a restatement of existing law.[20] It may

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835. Revenue Act of 1932, Sec. 145 (b), c. 209, 47 Stat. 169, 217. Revenue Act of 1934, Sec. 145 (b), c. 277, 48 Stat. 680, 725. Revenue Act of 1936, Sec. 145 (b), c. 690, 49 Stat. 1652, 1703. Revenue Act of 1938, Sec. 145 (b), c. 289, 52 Stat. 452, 513.

[18] Sec. 1017 (b), c. 234, 43 Stat. 253, 344. The House bill contained the old penalties but the Senate bill classified attempted evasion as a felony and increased the penalty. The Senate prevailed in conference. See Senate Report No. 398, 68th Cong., 1st Sess., p. 45, and Conference Report in House Report No. 844 68th Cong., 1st Sess., p. 32.

[19] For citations, see fn. 17, *supra*.

[20] The Chairman of the House Ways and Means Committee reported that the purpose of the bill was to enact into absolute law all the internal revenue laws then in force (84 Cong. Rec. 646). A member of the Committee stated that unlike some codifications which encompassed a "complete study of all laws, in an effort to take out the deadwood and inconsistencies, and resolve the inconsistencies into some form," the Joint Committee on Internal Revenue Taxation, in cooperation with the Treasury Department and the Department of Justice, "religiously stayed away from any attempt to make any change whatsoever." (84 Cong. Rec. 646, 647.) Another member of the Committee stated that although the bill might contain "a few minor mistakes" this was bound to occur in the achievement of the broad purpose to "simplify the law for the benefit of the businessmen and the taxpayers of the country." (84 Cong. Rec. 782.) Although there was some protest in the House

be added that the Internal Revenue Code of 1954 made a substantial change in Section 3616 (a) (re-enacted as Section 7207) in that an "intent to defeat or evade" taxes, required to be proved under Section 3616 (a) of the 1939 Code, is not an element of the offense of violating Section 7207 of the 1954 Code. See *Berra* v. *United States*, 351 U. S. 131, 134, footnote 5.

In sum, Congress has, in eight separate statutes enacted between 1924 and 1939, repeatedly declared that the offense of willfully attempting to evade income taxes shall be punishable as a felony: For at least 30 years prior to enactment of the 1939 Code, i. e., from 1909 to 1939, Section 3179 of the Revised Statutes of 1874 apparently did not apply to the income tax. When Congress re-enacted Section 3179 as Section 3616 (a) of the 1939 Code, it was, according to the committee reports, making no changes in existing law. Hence, it can be argued that Section 3616 (a) has the same scope as Section 3179, and no greater. Against this background, it is not reasonable to attribute to Congress a purpose, by re-enacting Section 3179 as Section 3616 (a) of the 1939 Code, to reduce the offense of income tax evasion by filing a fraudulent return, specifically defined in Section 145 (b) of the

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that "no one has read the bill" and that there had been no hearings (84 Cong. Rec. 786–787, 788), the bill was passed in reliance upon the work of "as fine a lot of experts as can be found" and the care and time which had been spent in compiling the Code. (84 Cong. Rec. 788.)

The Senate Committee on Finance and the House Committee on Ways and Means reported that the bill made "no changes in existing law." Sen. Rep. No. 20, 76th Cong., 1st Sess., p. 1; H. Rep. No. 6, 76th Cong., 1st Sess., p. 3.

same Code as a felony, to the status of a misdemeanor.

The leading case in this Court on the scope of Section 145 (b) is *Spies* v. *United States*, 317 U. S. 492, decided in 1943. Speaking for a unanimous Court, Mr. Justice Jackson characterized the "felony" proscribed by Section 145 (b) "as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax * * *." (317 U. S. at 497.) In the *Spies* case the particular question was whether "Congress by the felony defined in § 145 (b) meant no more than the same derelictions it had just defined in § 145 (a) as a misdemeanor" (*ibid.*). The Court stated that such an interpretation "would be unusual and we would not readily assume that Congress" so intended (*ibid.*). Similarly, we believe it would be no less unusual, and should no more readily be assumed, that Congress intended the felony of Section 145 (b), where it takes the form of filing a false and fraudulent return, to be reduced to the misdemeanor proscribed by Section 3616 (a).

In the *Spies* case the Court emphasized the comprehensive, all-embracing scope of Section 145 (b) as applied to attempted income tax evasions: "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation." (317 U. S. at 499.)

The filing of a false or fraudulent income tax return is only one, although the most common, of the ways in which Section 145 (b) can be violated. The *Spies*

opinion gave other examples. "By way of illustration, and not by way of limitation," the opinion stated, "we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." (317 U. S. at 499.) Indeed, the filing of a false return is not an essential ingredient of the offense of violating Section 145 (b). *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887.[21]

We have concluded, therefore, that Congress could not have intended that a violation of Section 145 (b) based upon proof of willful attempted evasion of income tax is to be treated and punished only as a misdemeanor, simply because in a particular case the facts show that a false and fraudulent return was filed. In such a case Section 145 (b) is clearly applicable. It is also arguable that, despite the generality of its language, Section 3616 (a) has been superseded with respect to income tax violations and is *pro tanto* inapplicable. Such a construction could derive further support from various established canons

[21] Accordingly, omission of an allegation, like that in the instant case (R. 3–5), that the "manner" of attempted evasion was the filing of a false return does not affect the validity of an indictment under Section 145 (b). *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C. A. 8), certiorari denied, 350 U. S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C. A. 7).

of statutory interpretation: (1) that in "construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty." *United States* v. *Yuginovich*, 256 U. S. 450, 463; *United States* v. *Tynen*, 11 Wall. 88, 93; (2) that criminal statutes should be construed to avoid uncertainty or doubt as to the punishment, *United States* v. *Evans*, 333 U. S. 483; and (3) that any statute should be interpreted, wherever reasonably possible, to avoid raising questions as to its constitutionality.

We may add that if Section 3616 (a) is construed to preclude imposition of felony sanctions in a Section 145 (b) case, the effect would not be limited to the income tax. Congress has provided many new forms of taxation since 1798. Its general practice has been, as in the case of the income tax, to establish a new offense, usually a felony, for attempted evasion of each such tax. Thus, the Internal Revenue Code of 1939 is replete with numerous other sections, worded almost identically like Section 145 (b), making it a felony to evade or defeat the admissions and dues tax (Section 1718 (b)); the estate tax (Section 894 (b) (2) (c)); the gift tax (Section 1024 (b)); the narcotics tax (Section 2557 (b) (3)); the firearms tax (Section 2707 (c)); the documents tax (Section 1821 (a) (2)); the tobacco tax (Section 2156 (b)).

A holding that Section 3616 (a) reduces the penalties provided by Section 145 (b) to those of a misdemeanor would be equally applicable to these various specific felony provisions. It is inconceivable that

Congress could have intended or anticipated so drastic a negation of the penalties provided in all these provisions.

CONCLUSION

The Government has presented in this memorandum materials which would support a conclusion that Section 3616 (a) is inapplicable to the income tax, and that as to the latter Congress has specifically and comprehensively legislated in Section 145 (b). If the Court accepts the construction of Section 3616 (a) as inapplicable to the income tax, it does not overlap Section 145 (b) and the Court would not reach the questions raised by the petition for certiorari. However, in view of the Court's actions in granting certiorari in Nos. 430 and 666, and of the obvious importance of settling the issues involved, the Government does not oppose issuance of the writ.[22]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.

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[22] In view of the uncertainty surrounding the question whether Section 3616 (a) applies to income tax violations, the Attorney General has directed that, pending definitive adjudication of the question by this Court, no prosecutions for income tax violations be instituted under that section.

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